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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

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| AMOS REED, et al., Petitioners, vs. LANFORD D. TRIBBLE, Respondent. | No. 88-1259<br>MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS |

The respondent Lanford D. Tribble asks leave to file the attached brief in opposition to petition for writ of certiorari, without prepayment of costs and to proceed *in forma pauperis*. Petitioner has been granted leave to so proceed in both the U.S. District Court and the Court of Appeals. Petitioner's affidavit in support of this motion is also attached hereto; also a supplemental affidavit of the undersigned counsel.

DATED this _____ day of March, 1989.

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MOTION TO PROCEED ON
APPEAL IN FORMA PAUPERIS

No. 88-1259

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

AMOS REED, et al.,

Petitioners,

V.

LANFORD D. TRIBBLE,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

I. Is a § 1983 defendant who would seek summary judgment based upon qualified immunity subject to the threshold burdens which are ordinarily imposed on any other moving party seeking summary judgment, including the burden of demonstrating the absence of a genuine issue of material fact, or of showing the absence of evidence to support an element of the non-movant's case?

II. On interlocutory appeal of a denial of qualified immunity, do the appellate courts have jurisdiction to review or consider the issue of the individual conduct or participation of a § 1983 defendant if such issue was never presented to or ruled upon by the District Court?

III. In the context of a claim for, and in response to qualified immunity, what evidence will suffice to demonstrate the existence of a genuine issue of material fact as to whether the ostensible or proffered justifications for a prison policy of administering a highly intrusive rectal cavity probe search to inmates are pretextual?

## LIST OF PARTIES

The parties to the proceeding below were the following Petitioners, who were aligned as Defendants-Appellants below: Amos Reed, former Washington Department of Corrections Secretary; Robert Trimble, Washington Department of Corrections Deputy Secretary; W. L. Kautzky, Director of the Division od Prisons; James C. Spalding, Deputy Director of the Division of Prisons; Lawrence Kincheloe, Washington State Penitentiary Superintendent; R. Zabor, Washington State Penitentiary medical staff; and Correctional Officers Sergeant Snell, J. King, Christy, P. Edwards, P. Jones, R. Hansen. L. Menke and S. Worden were later added as parties defendant.

Respondent Lanford D. Tribble, an inmate serving a sentence at the Washington State Penitentiary at Walla Walla, was aligned as the Plaintiff-Appellee below.

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## BRIEF IN OPPOSITION

The respondent Lanford D. Tribble respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion, on interlocutory appeal, affirming the denial of a motion for summary judgment based on qualified immunity. The Court of Appeal's opinion is reported at 860 F.2d 321 (9th Cir. 1988) and is reprinted as Appendix "A" to the Petition for Writ of Certiorari.

## I. STATEMENT OF THE CASE

Respondent Lanford D. Tribble, an inmate at the Washington State Penitentiary (WSP), initiated this action under 42 U.S.C. § 1983, seeking damages, declaratory and injunctive relief against prison officials[1] who promulgated and/or implemented a body cavity search policy and practice at WSP. Under that policy and practice, a digital probe search of an inmate's rectal cavity was routinely made in connection with the inmate's transfer to WSP's Intensive Management Unit (IMU), a highly secure housing unit ['prison within a prison'] in WSP, or

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[1]Booth Gardner, the Governor of the State of Washington, was initially named as a defendant but by order dated March 14, 1988, was dismissed with prejudice, Ct. Rec. No. 119. Counsel for petitioners have erroneously identified Governor Gardner as a petitioner in the certiorari Petition.

if and when the inmate re-entered the IMU after being temporarily absent.

In connection with transfer to the IMU and before receiving the rectal probe enroute, routinely (and likewise true in the instant situation) the inmate is placed in leg irons, and is handcuffed behind his back, with the handcuffs attached to a chain around his waist. The rectal probe was done notwithstanding the inmate's protest; it was done as a matter of policy, irrespective of any suspicion that the particular inmate has secreted contraband in his rectal cavity. The claimed justification for the rectal search policy is that inmates who are transferred to the IMU represent a dangerous class of inmates[2] who have propensity to violate prison regulations.

Respondent was transferred to the IMU and was subjected to the rectal cavity probe enroute to the IMU because contraband was found in the three-man cell *to which he was assigned*.

Under the prison's "cell tag" policy[3] each inmate is ipso facto responsible for an infraction occurring within the

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2 Notwithstanding petitioner's assertion to the contrary, the District Court made no ruling that "the policy is constitutional if aimed at a particularly dangerous class of inmates" (Pet. Appx. A-3). Likewise, the Court of Appeals expressly declined to make ruling as to whether the search or search policy as applied to IMU inmates violated constitutional principles (Pet. Appx. A-6). Both rulings were more narrowly confined.

3The "cell tag" policy is not presently before this Court.

cell *to which he is assigned* unless he can affirmatively establish a lack of involvement in the infraction. Before being subjected to the rectal probe enroute to the IMU, respondent Tribble was neither given notice of why he was being transferred nor opportunity to establish his lack of involvement with the contraband found in the three-man cell.[4]

At a later date, respondent was taken from the IMU to the prison hospital where a medical diagnostic x-ray was taken. The diagnostic x-ray also disclosed the absence of any contraband in his rectal cavity. Though aware of that finding, the guards required that respondent be subjected to another rectal probe before his return to the IMU because the prison rectal search policy did not recognize the efficacy of such an x-ray as an alternative to the digital probe.[5]

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[4]During discovery phases, petitioners have contended that the search of the subject cell (and of another cell or more) was based upon confidential information of a possible murder plot. However, apart from or prior to that, respondent was never given notice of that information and has never been charged with any complicity in any such plot.

[5]In oral argument to the District Court, counsel for petitioner acknowledged that the State of Washington was the only state prison system that utilized this highly intrusive rectal probe search practice (Ct. Rec. 43, pp. 14 and 15). Shortly thereafter, the State of Washington discontinued the policy and practice and substantially narrowed the circumstances under which a rectal probe may be used. The Federal Prison at Marion, Illinois, also allows use of the rectal search in more limited conditions and affords the inmate the opportunity to use an x-ray in lieu of the rectal search. Bruscino v. Carlson, 654 F. Supp. 609, 619 (S.D. Ill. 1987).

In response to respondent inmate's *pro se* handwritten complaint, petitioner officials moved for summary judgment, asserting that the digital rectal probe search policy and practice was justified by the needs of prison security, was not in violation of any clearly established rights of plaintiff, and that petitioners were immune from suit under principles of qualified immunity. Before hearing on the motion, the Court appointed counsel for the indigent inmate. Appointed counsel was not directed by the Court to recast the complaint and counsel did not do so except that, at a later date, additional counts were added which are not currently involved in the Petition for Certiorari.

Based upon the evidence presented, the Court of Appeals agreed that the rectal search policy constituted an exaggerated response to purported prison security considerations and accordingly declined to give deference to petitioners' expert judgment (Pet. Appx. A-13, Footnote 9) as to the need for the search. The Court of Appeals agreed that the law was clearly established at the relevant time that such a highly intrusive and humiliating search must be reasonably related to a legitimate penological need (Pet. Appx. A-9) and that inquiry into punitive purpose was permissible because such is an element of the substantive claim for violation of respondent's constitutional

rights.[6] The Court of Appeals agreed that the case presented by respondent inmate was a substantial one; that specific, non-conclusory, and significant probative evidence had been presented which demonstrates the existence of a genuine issue of material fact as to whether the intrusive probe search policy and practice was done for punitive purposes, unrelated to legitimate penological needs.

## II. REASONS FOR DENYING THE WRIT

### A. The Ordinary Requirements of Fed. R. Civ. P. 56(c) and (e) are Applicable to a Motion for Summary Judgment Based Upon Grounds of Qualified Immunity.

A major premise is missing from petitioners' argument that no evidence was produced of the individualized conduct or responsibility of any named petitioner-defendant. Missing is petitioners' acknowledgment that that issue was never fairly or squarely presented to the trial court, or ruled upon. Petitioners did allege as an affirmative defense 'failure to state a cause of action,' Fed. R. Civ. P. 12(b)(6); however, petitioners did not bring on for hearing any issue of pleading insufficiency.

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[6]At the Court of Appeals level, petitioners unsuccessfully argued that the district court erred as matter of law by inquiring into purpose or motivations for the search. Here, however, the Questions Presented limit inquiry in that area to the *standard of proof* required if an inquiry into such matter is made.

Pursuing their motion for summary judgment insofar as it was based on qualified immunity, petitioners made certain definitive contentions regarding qualified immunity. However, petitioners made only oblique reference, if at all, to the issue of *the sufficiency of evidence* of individualized conduct.[7] Petitioners made no attempt to demonstrate that respondent had no evidence to prove his case against any named defendant; indeed petitioners did not even make a "conclusory assertion" that respondent had no such evidence. See Celotex Corp. v. Catrett, 477 U.S. 325, 328 (1986) (Justice White, concurring).

No ruling was made by, or requested of, the District Court as to the issue of the sufficiency of evidence of individualized conduct. After issuance of the District Court's opinion, petitioners made no motion to have the Court reconsider its opinion to address that issue. The Court of Appeals declined to consider the issue for the first time on interlocutory appeal,

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[7]The only references known to respondent are as follows: Petitioner's Reply Brief (Ct. Rec. 40) to the District Court referenced the heightened pleading requirement which requires, for purposes of qualified immunity, that the complaint contain specific, non-conclusory factual allegations against each individual defendant (Ct. Rec. 40, pp. 2-3); that brief also noted that respondeat superior and vicarious liability theories are not applicable (Ct. Rec. 40, p. 3 and 4). Finally, in colloquy at oral argument, the District Court asked a general question of counsel for petitioners regarding the relative responsibility of those who establish the policy and those who implement it (Ct. Rec. 20, lines 6-11). However, in response, counsel then representing petitioners did not pursue or advance the issue.

holding that the record disclosed that "no named defendant has attempted to make such a [necessary] showing" on that issue (Pet. Appx. A-13).[8]

Harlow v. Fitzgerald, 457 U.S. 800 (1982), did not abrogate in qualified immunity cases the customary burdens imposed by Fed. R. Civ. P. 56(c) and (e) upon a moving party that there is no genuine issue as to a material fact. See Halperin v. Kissinger, 807 F.2d 180, 189 (Justice Scalia, sitting as designated Circuit Justice) (D.C. Cir. 1986); also see Green v. Carlson, 826 F.2d 647, 651 (7th Cir. 1987): "The Supreme Court clearly has envisioned that the issue of qualified immunity may arise in the context of a summary judgment motion, and has given no indication that the district court ruling on a motion for summary judgment on grounds of qualified immunity should follow a different procedure than if summary judgment had been requested on other grounds. [citations omitted]" McSurely v. McClellan, 697 F.2d 309, 321, Ftn. 20 (D.C. Cir. 1982) ("Harlow does not purport to purport to change the operation of Rule 56 in immunity cases."

Celotex Corp. v. Catrett, 477 U.S. 317, 326, reaffirms that a party seeking summary judgment ". . . always bears the initial

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[8]The Court of Appeals, in its Opinion at Footnote 10 stated, "Of course a named defendant may make such a showing at trial" (Pet. Appx. A-13).

responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." The Celotex court explained that a moving party is not necessarily required to produce evidence showing the absence of a genuine issue of material fact: "Instead, as we have explained, *the burden on the moving party may be discharged by "showing"--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case.*" Id., 477 U.S. 325 (Emphasis added).

One of the obvious purposes of requiring the moving party to make a *"showing"* as to the absence of evidence as to a major element of the plaintiff's case is to alert the non-moving party that he or she must come forth with the evidence to support that questioned element; such notice is required even when the court raises the issue sua sponte. Celotex Corp. v. Catrett, 477 U.S. 317, 326. Here no such notice given.

B. The Court of Appeals did not have Jurisdiction of the Issue of the Sufficiency of Evidence as to Individual Conduct.

A concommitant of the determination that the District Court did not rule, or decline to rule, on the issue of sufficiency of evidence of individual conduct is that on interlocutory appeal, the Court of Appeals would not have jurisdiction of that issue under 28 U.S.C. § 1291 or under the collateral order doctrine of

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541-561, 69 S. Ct. 1221 (1949). There has been no interlocutory decision, much less one which meets the Cohen three-part test as discussed in Mitchell v. Forsyth, 472 U.S. 511, 527, 105 S. Ct. 2806 (1985). Mitchell v. Forsyth holds that a district court's denial of a claim of qualified immunity is an applicable "final decision," within the meaning of 28 U.S.C. 1291 "to the extent that it turns on an issue of law," Id., at 530. Here the denial does not turn on the subject issue--there has been no ruling, or refusal to rule, on the subject issue of law.

C. In a Maximum Security Prison Setting, and in Response to a Claim of Qualified Immunity, What Evidence Will Suffice to Demonstrate the Existence of a Genuine Issue of Material Fact as to Whether the Proffered Justifications for a Prison Policy of Administering a Highly Intrusive Rectal Cavity Probe Search to Inmates are Pretextual.

Petitioners assert that the intent of Harlow v. Fitzgerald, 457 U.S. 800 (1982) would be defeated in a qualified immunity case if a plaintiff's case were able to survive a defendant's motion for summary judgment by showing circumstantial evidence or inference, however probative or significant, instead of direct evidence.

1. Respondent has Presented Direct, Significant and Probative Evidence that the Subject Search did not Serve Penological Needs.

Black's Law Dictionary, Revised Fourth Edition, defines "direct evidence" as follows:

> **DIRECT EVIDENCE.** Is that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect." See Brown; State v. Calder, 23 Mont. 504, 59 P. 903.

Parallelling that definition, respondent offered direct evidence which "tends to show the existence of a fact in question," i.e., that the rectal search policy was carried out in a manner and context which rendered the ostensible purpose of the search an absurdity and a gross exaggeration of a legitimate response to prison security needs. Respondent offered *direct evidence* that the only significant search of the person of the inmate being transferred to the IMU was of the rectal cavity. Other obvious and commonly used areas were not searched (clothing, hands, hair, mouth, nose, ears, etc.). That and other direct specific, significant, and probative evidence which controverted the proffered claim that the probe search was needed for legitimate penalogical purposes is outlined by the Court of Appeals in its opinion (Pet. Appx. A-9 to A-10). An even more complete listing of the evidence appears in the District Court opinion (Pet. Appx. B-4 to B-6 and B-12, fn. 1).

Such evidence clearly distinguishes this case from the "insubstantial claims" which Harlow at 813 said should be resolved on summary judgment, or claims which are premised upon "bare allegations of malice." Id. at 817, 818. Harlow clearly did not intend to place insuperable barriers in the way of substantial claims. Harlow at 819: "By defining the limits of

qualified immunity essentially in objective terms, we provide no license to lawless conduct." Harlow showed no animosity toward substantial cases; to the contrary, Harlow recognized that an action for damages may be "the only realistic avenue for vindication of constitutional guarantees." Harlow, at 814. That circumstantial evidence can be highly probative and trustworthy is evidenced by the fact that juries are commonly instructed that the law makes no distinction between the weight given either direct or circumstantial evidence and that one is not necessarily more or less valuable than the other. See e.g. Federal Jury Practice and Instructions, Devitt & Blackmore, Vol. 1, § 15.02. Proof of intent, motive or purpose are ordinarily proved by circumstancial evidence; indeed, such can rarely be established by any other means. Id. § 40.11. The court of appeals recognized the realities of the situation:

> In cases where the purpose of a prison regulation is at issue, there is no 'direct evidence' equivalent to legislative history that plaintiff's may examine. To hold plaintiffs in such cases to a 'direct evidence' standard would effectively insulate arbitrate governmental action from judicial scrutiny (Pet. Appx. A-12).

2. Turner v. Safley does not Denigrate Circumstantial Evidence.

Possibly the Court may conclude that the direct evidence presented by respondent only circumstantially tends to prove the punitive motivations or purposes of the search policy or practice, even though such evidence directly proves that the policy and practice was an exaggerated response to security

needs. Accordingly, respondent will below state his contentions as to the effect to be given probative and significant circumstantial evidence as to motivation.

Petitioners argue that Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254 (1987) presents policy considerations which mandate direct evidence standards in connection with any challenge to prison regulations (Pet. Appx. A-7, 8). Turner v. Safley employs a method of analysis which examines prison regulations by considering whether the regulation is "reasonably related to legitimate penalogical interests," or conversely is "an exaggerated response" to prison concerns. 482 U.S. at 78. Turner v. Safley determined that the subject prison restrictions of inmate correspondence did not violate the First Amendment but that restrictions on inmate marriages violated the inmate's constitutional rights regarding marriage. Significantly, Turner v. Safley did not conclude that circumstantial evidence could not be employed in testing the validity of the regulations; indeed, it is obvious that circumstantial evidence was employed in finding the marriage restriction unconstitutional. Certainly, there was no direct evidence in the form of past documentation, testimony, admission, or "legislative history" under and by which the prison authorities acknowledged the marriage restrictions to be an exaggerated response to legitimate penalogical needs. Admittedly, Turner v. Safley was not a qualified immunity case; however, it is evident that the case does not stand for the broad proposition which petitioner's advance, i.e., that only direct

evidence is competent to challenge whether a regulation is reasonably related to legitimate penalogical needs, or is an exaggerated response thereto.

3. Unless Near-Absolute-Immunity is to be Accorded, Reality Necessitates the Use of Probative and Significant Evidence, Including Circumstantial Evidence.

In the narrower context of qualified immunity, we submit that public policy considerations do not reflect the need for a highly restrictive direct evidentiary standard in cases of improper motive or purpose.[9]

Traditionally, circumstantial evidence has been relied upon in considering whether a § 1983 substantive violation has been shown. See Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985) which involved a § 1983 claim of discrimination:

> In the equal protection context, just as in a Title VII disparate treatment case, discriminatory intent need not be proved by direct evidence. '[D]etermining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as maybe available.'Rogers v. Lodge, 458 U.S. 613, 102 S. Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S. Ct.

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[9]Consider here the need for a heightened evidentiary standard, which is conceptually distinct from the heightened pleading standard of Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984) that requires "non-conclusory allegations of evidence of such [unconstitutional motive] or intent," Id. at 29, and that requires allegations of "specific facts to support a claim of unconstitutional motive." Id. at 30.

555, 564, 50 L.Ed.2d 450 (1977); citing Washington v. Davis, 426 U.S. at 242, 96 S. Ct. at 2049.

A highly restrictive standard calling for direct evidence only would have far reaching implications as to qualified immunity from an alleged equal protection violation involving discriminatory intent; from an Eighth Amendment case claiming cruel and unusual punishment which requires a showing of "deliberate indifference"; from liability for sanctions or discharge of employees made for pretextually valid reasons but actually based upon improper purposes in violation of First Amendment rights, etc. See *"Qualified Immunity for Governmental Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation,"* 95 Yale Law Journal 126, 135-136.

Respondent submits that the realities are such that an evidentiary standard which would reject specific, non-conclusory, probative and significant circumstantial evidence as being insufficient to evidence improper purpose or motivation is essentially tantamount to a grant of absolute immunity. Harlow v. Fitzgerald declined to grant or endorse absolute immunity.

4. Cases Relied upon by Petitioners Calling for a Direct Evidence Standard are Distinguishable, Unpersuasive and do not Merit Grant of Certiorari in this Case.

A case primarily relied upon by petitioners, Martin v. D.C. Metropolitan Police Dept., 812 F.2d 1425, vacated in part 817 F.2d 144 (Sec. IV of opinion and dissenting opinion)

reh'g. denied 824 F.2d 1240 (Sec. IV of Opinion, dissenting opinion, and judgment reinstated) (D.C. Cir. 1987) stated a rule calling for direct evidence but did so before ascertaining the quality of evidence which would be unveiled by plaintiff upon the limited discovery which the D.C. Court of Appeals authorized. Thus, the standard was enunciated in an abstract situation, without benefit of knowing how probative or significant the evidence in that case. The standard was not there applied in relation to specific facts.

As noted by the Court of Appeals in the instant case (Pet. Appx. A-12), Martin is also factually distinguishable from the present case. The core of Martin's complaint was that the defendant officers were "animated by improper motives in deciding to pursue his arrest and indictment." Martin, 812 F.2d at 1429. Martin had to demonstrate subjective malice directed at him; at hand, the issue addresses a larger inquiry and a fact situation which is not comparable, an overall policy and practice which is absurd, exaggerated and has punitive impact. A more general and non-specific intent is involved; certainly respondent need not evidence that petitioners harbored special animus toward him.

Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988), also relied upon by petitioners, was before the court in circumstances somewhat similar to those in Martin. Poe v. Haydon involved an inquiry whether a government employee's assignment to certain work which needed to be done was motivated by gender-based animus. At 432, the Court stated that the act of assigning an employee to that

lawful and proper work was deemed to be a neutral act[10] which could only be made unlawful by a specific motive or intent. Following the lead of Martin, the Sixth Circuit held that direct evidence of such improper motivation must be presented, i.e., "something more than inferential or circumstantial support for [her] allegation of unconstitutional motive." Poe v. Haydon at 432. Like Martin, Poe v. Haydon was decided in advance of the actual identification of the evidence which the plaintiff could present.

5. The Focus should be on the Substantiality of the Evidence and not upon an Arbitrary Classification of Evidence.

A more common approach is taken in Wright v. South Arkansas Regional Health Center, Inc., 800 F.2d 199, 204, 205 (8th Cir. 1986), which was cited in Poe v. Haydon, supra. In Wright, it was held that certain murky evidence held did not create a genuine issue of material fact. Subjective analysis was made as to the quality and sufficiency of the evidence. A subjective analysis as to sufficiency of evidence commonly occurs in summary judgment review, with the focus being upon the substantiality of the evidence and not upon an arbitrary, unbending classification. Granted, the Martin and Poe v. Haydon courts were not dealing with summary judgment generally, but were

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[10] In contrast, the act of searching the rectal cavity for contraband and not searching other obvious, commonly used areas of the body, is hardly a "neutral act."

concerned with not allowing a case based on unsubstantial evidence to survive summary judgment. Nevertheless, the public policy interest of achieving early termination of any insubstantial litigation is of great importance, see Celotex, supra, and subjective analysis has proven its own merit in those cases.

Other courts have found circumstantial evidence to the trustworthy in a qualified immunity setting. Turner v. Dammon, 848 F.2d 440 (4th Cir. 1988), was a qualified immunity case in which circumstantial evidence was found to be highly persuasive. In that case, the owners of a topless bar claimed they were being subjected to selective searches in violation of clearly established Fourth Amendment law. Their bar had been visited or searched by the officers at least 100 times, substantially more frequently than any other bar, all without productive results and without objective basis. The Fourth Circuit Court of Appeals was sufficiently persuaded by the circumstantial evidence which had been presented that it suggested partial summary judgment as to liability "if no supplementary explanation of the defendants' conduct is added to the record." Id. at 447. Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985).

Also, see Pueblo Neighborhood Health Centers v. Losavio, 840 F.2d 642, 648-650 (10th Cir. 1988) in which the Tenth Circuit broadly agreed with the certain aspects of Martin v. D.C. Metropolitan Police Dept., supra, but which nevertheless did not adopt the "direct evidence" standard of Martin. In Pueblo, the

Tenth Circuit stated that in cases involving qualified immunity of a governmental officials "the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the official's actions were improperly motivated" (emphasis added). Pueblo, at 649; further, at fn. 5:

> This court has imposed an analogous burden of on antitrust conspiracy plaintiffs. See e.g., Bright v. Moss Ambulance Service, Inc., 824 F.2d 819, 824 n. 6 (10th Cir. 1987) (mere conclusory allegations do not establish an issue of fact under Fed R. Civ. P. 56); Instructional Sys. Dev Corp. v. Aetna Casualty & Sur. Co., 817 F.2d 639, 644 (10th Cir. 1987) ("Allegations . . . must be supported by *significant probative evidence* in order to overcome a motion for summary judgment.") (emphasis added).

It appears implicit that the Pueblo court recognized that the direct evidence standard of Martin and of Poe v. Haydon is too restrictive.

The constitutional interests are also dissimilar. Protection of the interests involved in the present case (sanctity of the human body against exaggerated, punitive and unreasonable searches) would not be served by the evidentiary standard proposed by petitioners. Stark, compelling evidence and circumstances such as are at hand were not before the courts in Martin or in Poe v. Haydon. With due respect to those courts, it is submitted that it is doubtful that those courts would have used the same language had they been confronted at that time with this evidence. Neither decision gave any exposition as to the larger implications, workings, or impact of the direct evidence

standard. A conflict between circuits should not be found where such implications and workings of the direct evidence standard have been so insufficiently tested, and where it is not at all clear that those circuits which have announced that rule would apply it to the circumstances at hand.

With due respect to those courts, respondent submits that the direct evidence standard is misguided and represents an over-kill. The instant case, which bears no factual correspondence to either Martin or Poe v. Haydon, and which involves dissimilar constitutional interests, is not the case for the Supreme Court to make a pronouncement regarding direct evidence vs. circumstantial evidence in qualified immunity cases.

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 15th day of March, 1989.

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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MAR 14 1988

JAMES R. LARSEN, Clerk
_____ Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

| | |
|---|---|
| LANFORD D. TRIBBLE,<br><br>Plaintiff,<br><br>vs.<br><br>BOOTH GARDNER, et al.,<br><br>Defendant. | NO. C-86-234-JLQ<br><br>ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND ORDER OF PARTIAL DISMISSAL WITH PREJUDICE |

**BEFORE THE COURT** is defendants' Motion to Dismiss Defendants Gardner, Worden, John Doe 1 and John Doe 2 (Ct. Rec. 114).

Plaintiff's response (Ct. Rec. 118) indicates that he has no objection to the dismissal of Booth Gardner. Therefore, the complaint and the claims therein are **DISMISSED WITH PREJUDICE** as to defendant Booth Gardner.

As to defendants John Doe 1 and John Doe 2, plaintiff states in his response that those defendants were dismissed in an order filed prior to the filing of plaintiff's amended complaint. Plaintiff also states that he has no objection to the dismissal of defendants John Doe 1 and John Doe 2 if the



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court determines that a further order of dismissal as to those defendants is necessary.

In his amended complaint (Ct. Rec. 106), plaintiff again names defendants John Doe 1 and John Doe 2. As plaintiff does not object to their dismissal, the complaint and the claims therein are **DISMISSED WITH PREJUDICE** as to defendants John Doe 1 and John Doe 2.

Finally, defendants argue that the court should dismiss defendant Steve Worden because plaintiff has failed to allege acts on the part of that defendant which amount to a constitutional violation and because the court does not have personal jurisdiction over that defendant. As to the second argument, defendants allege that the court has no personal jurisdiction over defendant Worden because that defendant did not engage in conduct in Washington which violated plaintiff's constitutional rights, nor in tortious conduct, and the Washington Long-Arm Statute therefore does not confer jurisdiction over defendant Worden. Thus, the validity of the second argument depends upon the validity of the first.

In the first argument, defendants argue that plaintiff has failed to state a claim against defendant Worden because the complaint alleges only that defendant Worden made derogatory comments to plaintiff prior to the digital-rectal



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probe and that threats do not state a cognizable 42 U.S.C. § 1983 action. Defendants correctly argue that threats alone will not state a cause of action pursuant to 42 U.S.C. § 1983 for violation of a prisoner's Eighth Amendment rights.

In this case, however, plaintiff also alleges that the defendants' conduct violated his Fourth Amendment right to be free from unreasonable searches. In Bell v. Wolfish, 441 U.S. 520 (1979), the United States Supreme Court stated the relevant inquiry in determining the validity of a search of a prisoner. In that case, the court held that "each case requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id. at 559 (Emphasis added, citations omitted). Although the court's holding stated that the Fourth Amendment does not bar all visual cavity searches, the court also stated in dicta that such searches must be conducted reasonably and that searches conducted abusively may violate a prisoner's Fourth Amendment rights. Id. at 560.

In his amended complaint (Ct. Rec. 106), plaintiff alleges that defendant Worden made an abusive statement to

plaintiff sometime prior to a digital-rectal probe. Defendants have not established or even argued that the statement was so unrelated to the search that the court could not consider it in determining if the search was unconstitutionally abusive, nor have defendants established or argued that the statement was insufficient to render the search unconstitutionally abusive. Therefore, defendants' motion to dismiss is **DENIED** to the extent defendants seek the dismissal of defendant Worden for failure to state a claim as to that defendant. Accordingly,

**IT IS ORDERED:**

1. As to defendant Booth Gardner, defendants' Motion to Dismiss is **GRANTED**; the complaint and the claims therein as to him are **DISMISSED WITH PREJUDICE.**

2. As to defendants John Doe 1 and John Doe 2, defendants' Motion is **GRANTED**; the complaint and the claims therein as to them are **DISMISSED WITH PREJUDICE.**

3. As to defendant Steve Worden, defendants' Motion is **DENIED.**

**IT IS SO ORDERED.** The Clerk is directed to enter this Order and forward copies to counsel.



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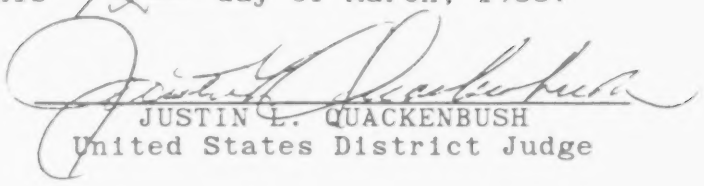
DATED this 12th day of March, 1988.



JUSTIN L. QUACKENBUSH
United States District Judge



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